IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION NO.356 OF 1996
CONVERTED FROM
(CRIMINAL APPEAL No 561 of 1993)

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

STATE OF GUJARAT

Versus

MAHENDRA MILLS LTD.

Appearance:

Shri M.A.Bukhari, Additional Public Prosecutor, for the Appellant.

Shri K.D.Gandhi, Advocate, for Shri K.S.Nanavati, Advocate, for the respondents.

CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 14/10/96

ORAL JUDGEMENT

The order of acquittal passed by the learned Judicial Magistrate (First Class) at Kalol on 30th January 1993 in Criminal Case No.1022 of 1987 is under challenge in this appeal by leave of this court under Section 378 of the Code of Criminal Procedure, 1973 (the Code for brief). Thereby the learned trial Magistrate has acquitted the respondents - accused only on the ground that the complaint against them was filed beyond the period of one year in view of Section 468 thereof.

2. It is not necessary to set out in detail the facts giving rise to this appeal. It may be sufficient to note that the Government Labour Officer - cum Conciliation Officer under the Industrial Disputes Act, 1947 (the I.D.Act for brief) filed his complaint on 7th July 1987 against the respondents herein charging them with the offences punishable under Section 25-Q and Section 31 (2) read with Section 25-M (1) of the Act and

Rule 79-A of the Industrial Disputes (Gujarat) Rules, 1966 (the Rules for brief) framed under Section 38 thereof. It was stated in the complaint that the respondents had given lay off to certain workmen from 20th February to 13th March 1986. It came to be registered as Criminal Case No.1022 of 1987. It appears that respondent No.2 herein (accused No.2 in the trial court) was not served. For mysterious reasons, the learned trial Magistrate did not insist on service of summons to respondent - accused No.2. On behalf of the accused, a discharge application was made at Exh.19 on the record of the trial court. After hearing the parties, by his order passed below the complaint at Exh.1 in Criminal Case No.1022 of 1987, the learned trial Magistrate at Kalol acquitted the accused of the offences alleged to have been committed by them in the complaint. That aggrieved the State government. It has therefore by leave of this court invoked its appellate jurisdiction under Section 378 of the Code for questioning the correctness of the aforesaid order of acquittal passed by the learned trial Magistrate.

3. Learned Advocate Shri Gandhi appearing for the respondents - accused has raised a preliminary objection against maintainability of this appeal on the ground that the impugned order is that of discharge and not of acquittal and no appeal lies against the order of discharge under Section 378 of the Code. As against this, learned Additional Public Prosecutor Shri Bukhari for the appellant has submitted that, though the application on behalf of the accused was made for their discharge, the tenor of the impugned order passed by the learned trial Magistrate shows that they were acquitted of the offences in respect of which the complaint was filed. It has been urged by learned Additional Public Prosecutor Shri Bukhari for the appellant - State that the substance of the order in question has to be seen for the purpose of deciding whether it is an order of acquittal or discharge.

4. I find considerable force in the submission urged before me by learned Advocate Shri Gandhi for the respondents. The reason therefor is quite simple. As rightly submitted by learned Advocate Shri Gandhi for the respondents, Section 468 of the Code puts an embargo on taking cognizance of the offence if it is filed beyond the period of limitation prescribed therein. If cognizance of an offence is taken beyond the period of limitation prescribed thereunder, the proceeding can be said to be void ab initio. If cognizance is taken after condonation of delay in accordance with Section 473 of

the Code, the proceeding would not be without competence and it would not be void ab initio. But if the cognizance of the offence is taken beyond the period of limitation as prescribed under Section 468 of the Code without condoning the delay, the proceeding can be said to be without competence, and as such void ab initio. The aggrieved person in that case can approach this court under Section 482 of the Code for quashing the proceeding. Different considerations would however arise if the cognizance of the offence is not taken as hit by the limitation prescribed in Section 468 of the Code though the delay is sought to be condoned under Section 473 thereof. In that case, the Court refuses to take cognizance of the offence and thereby it can be said to refuse to initiate the proceeding against the accused. It would then mean that the court does not want to frame any charge against the accused. If the accused is or are released by the trial court without framing any charge, the order would certainly amount to discharge of such accused. Against an order of discharge, no appeal under Section 378 of the Code would be maintainable.

5. I am supported in my aforesaid view by the Division Bench ruling of the Calcutta High court in the case of L.B.ROY v. TARAPADA TRUST ESTATE, an extract of which is reported as 1979 Cri. L.J. (NOC) 139 (Cal.). It has been held therein that, where a proceeding is void ab initio or it does not lie having been filed beyond the period of limitation, it would be open to a court to drop the proceedings, and such dropping of the proceedings however cannot tantamount to an order of acquittal. I am in respectful agreement with the aforesaid principle of law enunciated by the Division Bench of the Calcutta High Court in its aforesaid ruling. It buttresses the view that I have taken in this case.

6. At this stage, learned Additional Public Prosecutor Shri Bukhari for the appellant - State applies for conversion of this appeal into a revisional application. Such leave as prayed for is granted. This appeal is ordered to be converted into a revisional application under Section 397 read with Section 401 of the Code. The question of service of Rule need not arise in this case as the respondents have chosen to appear through their advocate in this appeal. I have therefore thought it fit not to insist on service of Rule in this case; nor has learned Advocate Shri Gandhi for the respondents so insisted.

7. It appears that the learned trial Magistrate has passed the impugned order under Section 468 of the Code

and has not taken into consideration Section 473 thereof only on the ground that an application for condonation of delay was not made simultaneously with the filing of the complaint. In support of his aforesaid view, the learned trial Magistrate has relied on the ruling of the Allahabad High Court in the case of STATE OF U.P. v. SURENDRA NATH reported in AIR 1992 Supreme Court at page 127.

8. As rightly submitted by learned Additional Public Prosecutor Shri Bukhari for the appellant - State, the aforesaid ruling of the Allahabad High Court will not be applicable in the present case. What was involved therein was the question of condonation of delay in preferring an appeal. The appellant - State did not choose to explain the delay in preferring the appeal and the court had to dismiss the appeal filed beyond the prescribed period of limitation in view of Section 5 of the Limitation Act, 1963 (the Limitation Act for brief). It cannot be gainsaid that the aforesaid statutory provision would inter alia require the appellant to make out a sufficient cause for condonation of delay, if any, in preferring the appeal against the judgment and order in question. In that context, the appellant guilty of delay in preferring the appeal would be required satisfactorily to explain the delay in order to make out a sufficient cause for the purposes of Section 5 of the Limitation Act. It does not provide for condonation of delay "in the interests of justice" or any such like expression. It is thus clear that the condition precedent for invoking the discretion of the court under Section 5 of the Limitation Act is making out a sufficient cause for condonation of delay. No delay in preferring an appeal or a revisional application thereunder would be condoned if no sufficient cause is made out.

9. As against this, Section 473 of the Code enables the court to take cognizance of an offence after expiry of the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or "that it is necessary so to do in the interests of justice". It is thus clear that the cognizance of an offence can be taken even after expiry of the period of limitation on fulfilment of either of the two conditions, namely, the delay in launching prosecution may properly be explained or in the alternative it should be shown that such cognizance is necessary in the interests of justice. This second alternative condition is missing in Section 5 of the Limitation Act. In that view of the matter, the aforesaid ruling of the Allahabad High Court will not be

applicable in the instant case.

10. In this connection, a reference deserves to be made to the ruling of this court in the case of STATE v. CHIMANLAL GORDHANBHAI reported in (1978) 19 Gujarat Law Reporter at page 603. The expression "it is necessary so to do in the interests of justice" occurring in Section 473 of the Code has been interpreted inter alia to mean that justice should not suffer on the mere ground that the offence is a stale one. It has been held therein:

"The words 'it is necessary to do so in the interest of justice' are words of wide amplitude and it is left to the court in each individual case to decide whether justice demands that the bar of sec. 468 should be by-passed having regard to the facts and circumstances of that case. The discretion must be exercised judicially and not in an arbitrary or capricious manner. It therefore follows that the Parliament has in the scheme of Chapter XXVI resorted to a careful balancing of the relevant factors between the two termini, namely, while every effort should be made to avoid delay in charging the offender on the one hand, on the other, the ends of justice should not suffer on the mere ground that the offence charged is a stale one. The ultimate and paramount anxiety of the court must be to see that the interests of justice reign supreme and, if the bar of sec. 468 stands in the way of achieving this objection, sec.473 can be invoked by the court to overlook the same altogether. The question whether it is necessary to overlook the bar of sec. 468 to serve the ends of justice would depend on the facts and circumstances of each case.

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The words 'it is necessary so to do in the interest of justice' appearing at the conclusion of sec. 473 do not take colour from the preceding words namely, 'if it (court) is satisfied on the facts and circumstances of the case that the delay has been properly explained'. The rule of ejusdem generis can be invoked only if there is a common thread passing through the previous clauses which would control the words of general import. There is, therefore, no genus or common thread discernible from the specific words so as to control the second part of the section

or to infer that Parliament intended to restrict the scope of that part of the section.

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In order to answer the crucial question whether the facts and circumstances of the case demand that the bar of sec. 468 of the Criminal Procedure Code be overlooked in the larger interest of justice, the court must address itself the following questions: Who is the offender? What is his offence? Who is the victim of his offence? Why is it made an offence under the Act, i.e. what is the mischief it seeks to suppress? Will the ends of justice be better served or defeated if the bar of sec.468 of the Code is applied? These are some of the valid considerations to be borne in mind while deciding the question whether the delay in prosecuting the accused should be disregarded in the interests of justice. The accused before the court is an economic offender, an tax dodger, whose crime is the result of a deliberate and calculated manoeuvre made in the quietude of his office. It would be reasonable to presume that he was aware of the risk he was taking when he decided to embark upon this court which was likely to lead him to prison. Regardless of the risk involved he thought it profitable to manipulate his accounts with a view to avoiding or reducing his liability to pay tax under the Act. Failure to maintain true accounts of the value of the goods bought or sold is made an offence so that dealers who are generally shrewd businessmen, are deterred from indulging in such activities which would cause loss of revenue to the exchequer. A multitude of such offenders are collectively responsible for throwing away the revenue estimates which are the basis on which national development programmes are undertaken by the country. Such people are largely responsible for shattering the economy of the country, and it is a moot question if such people should be allowed to go scotfree on the plea that the prosecution is stale. By their very nature such offences do not come to light immediately and are generally preceded by prolonged inquiries and hence in a large number of such cases the period of limitation provided by the Code may run out and it is precisely for dealing with such situations that over-riding powers are given by

> sec. 473 of the Code to overlook the delay if the interests of justice so demand. Merely because wide discretionary powers have been given to the department, it cannot be said that the legislature did not intend to treat such case severally. In fact, such economic offenders have to be penalised because their crime is a calculated one, the punishment could only have been provided so that the offender may be deterred from repeating his performance and others like him learn a lesson."

11. Sitting as a single Judge, the aforesaid ruling of this court is binding to me. Even otherwise, I am in respectful agreement therewith. Its study would leave no room for doubt that it is not necessary that an application for condonation of delay has to be made simultaneously with institution of the prosecution by means of a complaint. Even at the time of hearing of the question regarding taking cognizance of the offence beyond the period of limitation prescribed under Section 468 of the Code, the prosecution can show to the court that it would be in the interests of justice to take its cognizance even after expiry of the period of limiation. The view taken by the learned trial Magistrate that an application for condonation of delay should have simultaneously been made at the time of filing of the complaint runs counter to the aforesaid principle of law enunciated by this court in its aforesaid ruling and cannot therefore be sustained in law. It has to be quashed and set aside.

12. Learned Advocate Shri Gandhi for the respondents has then invited my attention to the binding ruling of the Supreme Court in the case of STATE OF PUNJAB v. SARWAN SINGH reported in AIR 1981 Supreme Court at page 1054. In that case, the trial court had convicted the accused of the offence punishable under Section 406 of the Indian Penal Code, 1860 and sentenced him to rigorous imprisonment for one year and fine of Rs.1000. In appeal at the instance of the accused, the High Court found the prosecution to have been launched beyond the period of limitation of three years prescribed under Section 468 of the Code. Thereupon, the High Court accepted the appeal and set aside the order of conviction and sentence passed by the trial court. In appeal to the Supreme Court, the aforesaid judgment of the High Court was affirmed. In the course of the judgment, the Apex Court has highlighted the object behind prescribing the limitation under Section 468 of the Code for taking cognizance of a stale offence in the context of Article 21 of the

Constitution of India. I am bound by the aforesaid ruling of the Supreme Court. It is however distinguishable on its own facts. No case before the High Court was made out for condonation of the delay in launching the prosecution under Section 473 of the Code. It seems it was not urged before the High Court or before the Supreme Court that cognizance of the offence even after expiry of the period of limitation was in the interests of justice. It appears that, in absence of any such plea taken by or on behalf of the prosecution in that case, the Supreme Court has chosen to affirm the view of the High Court to the effect that the prosecution was hit by Section 468 of the Code.

13. In the present case, it transpires from the impugned order that the prosecution tried to justify its belated action in launching the prosecution. The learned trial Magistrate did not consider the case under Section 473 of the Act only on the ground that an application for condonation of the delay in launching the prosecution was not made simultaneously with the complaint. That view of the learned trial Magistrate runs counter to the aforesaid ruling of this court in the case of CHIMANLAL GORDHANBHAI (supra). In that view of the matter, the aforesaid binding ruling of the Supreme Court in the case of SARWAN SINGH (supra) is distinguishable on its own facts.

14. Learned Advocate Shri Gandhi for the respondents has submitted that the lay off at the relevant time was on account of power-cut and, in view of the binding ruling of the Supreme Court in the case of ASHOK KUMAR JAIN v. STATE OF BIHAR reported in 1995 (II) Labour Law Journal at page 685 (Supreme Court), no prosecution should have been launched. As rightly submitted by learned Additional Public Prosecutor Shri Bukhari for the applicant - State, such a plea was not taken up before the learned trial Magistrate and there is no material on record justifying any conclusion in that regard. As rightly submitted by learned Additional Public Prosecutor Shri Bukhari for the applicant - State, it would be open to the learned trial Magistrate to examine the material, if any, on record in the light of the aforesaid ruling of the Supreme Court in the case of ASHOK KUMAR JAIN (supra).

15. In view of my aforesaid discussion, I am of the opinion that the impugned order passed by the learned trial Magistrate cannot be sustained in law. It has to be quashed and set aside. The matter will have to be remanded to the learned trial Magistrate for restoration

of the proceeding to file and for his fresh decision according to law in the light of the aforesaid ruling of this court in the case of CHIMANLAL GORDHANBHAI (supra).

16. It transpires from the record of this appeal converted into a revisional application that respondent No.2 herein has been served. It would be open to the trial court to arrange for service of summons to respondent No.2 herein (original accused No.2 at trial) so that the matter does not go by default on account of non-service of summons to him.

17. In the result, this revisional application is accepted. The order passed by the learned Judicial Magistrate (First Class) at Kalol on 30th January 1993 in Criminal Case No.1022 of 1987 discharging the respondents herein is quashed and set aside. The matter is remanded to the learned trial Magistrate for restoration of the proceeding to file and for its fresh disposal according to law in the light of this judgment of mine. Since the case is very old, the learned trial Magistrate is directed to accord top priority to it for its expeditious disposal. Rule is accordingly made absolute to the aforesaid extent.

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